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IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY STUART RING,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Arizona

BRIEF FOR *AMICI CURIAE* ALABAMA, COLORADO, DELAWARE, FLORIDA, IDAHO, INDIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW YORK DISTRICT ATTORNEYS ASSOCIATION, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VIRGINIA, IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amicus curiae State of Alabama, together with fourteen other states and organizations, submits this brief in support of the State of Arizona, urging this Court to affirm the judgment of the Arizona Supreme Court in this case and to reaffirm this Court's ruling in *Walton* v. *Arizona*, 497 U.S. 639 (1990). At issue in this case is the effect of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), on Arizona's practice of requiring its judges, after a jury verdict finding a defendant guilty of a capital crime, to find specific aggravating circumstances not found by the jury before imposing a sentence of death. Many of amici are states that also involve their judges in the capital sentencing process. They have done so in reliance upon this Court's approval of judicial capital sentencing in *Walton* and other cases. While the ruling in this case may not necessarily invalidate those states' various capital sentencing schemes, they nonetheless have a strong interest in seeing that this Court's capital jurisprudence, ensuring the validity of judicial capital sentencing, remains intact.

In addition, even those states that place capital sentencing authority in the jury have an interest in the issue whether sentencing proceedings following a conviction for capital murder fall outside the holding of *Apprendi*. This Court has recognized that aggravating circumstances are "not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986). A contrary determination — that aggravating circumstances are, in fact, elements of the offense that must be submitted to a jury and proven beyond a

reasonable doubt — may also affect the validity of certain jury capital sentencing schemes.

SUMMARY OF ARGUMENT

The practice of requiring a trial judge to find aggravating circumstances in order to impose capital punishment was not only affirmed by this Court in *Walton* v. *Arizona* but developed in response to *Furman* v. *Georgia* and this Court's subsequent Eighth Amendment jurisprudence. The rule of *Furman* and *Walton* authorizing the practice is a workable one, upon which many amici have relied in numerous cases, and it is consistent with the principle articulated by this Court two terms ago in *Apprendi* v. *New Jersey*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. 466, 490 (2000). The rule should not be invalidated.

In *Apprendi*, this Court explained that, once a jury has found a defendant guilty of all the elements of an offense that by statute entitles the prosecution to a certain maximum penalty, a judge may then decide whether to impose that maximum penalty, or a lesser one, taking into account a variety of facts not necessarily submitted to or considered by the jury. Because the maximum penalty in a capital case is death, *Apprendi* permits judges to apply statutory aggravators in capital sentencing. 530 U.S. at 496-497 (2000). Moreover, this Court has previously and repeatedly recognized that capital aggravating circumstances are not elements of the offense; rather, they are guidelines to channel the sentencer's discretion in determining whether to impose

the death penalty. See, e.g., *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986) (aggravating circumstances are not separate penalties or offenses but rather are standards to guide the making of the choice between the alternative verdicts of death and life imprisonment).

The doctrine of stare decisis thus counsels against the overruling of *Walton* and the invalidation of judicial capital sentencing. (Amici understand it is not judicial capital sentencing per se, but judicial capital sentencing on the basis of mandatory statutory aggravators not found by the jury, that is at issue in this case. For the sake of shorthand, however, amici will refer to this practice throughout this brief as "judicial capital sentencing.") A decision must do more than raise questions about the theoretical underpinnings of a prior decision in order to warrant its overruling. It must render the prior decision "manifestly erroneous," a "mere survivor of obsolete constitutional thinking." *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 857 (1992) (plurality opinion). To reject a line of jurisprudence absent "bona fide changes in our decisional law" would do "violence to the legitimacy we derive from reliance on" the doctrine of stare decisis. *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997). This Court should accordingly reaffirm *Walton* v. *Arizona*, permitting judicial capital sentencing, and affirm the judgment of the Arizona Supreme Court.

ARGUMENT

In *Furman* v. *Georgia*, this Court ruled that unconstrained discretion in capital sentencing violated the Eighth Amendment. 408 U.S. 238 (1972) (per curiam). In response, at least thirty-five states adopted new capital sentencing procedures. *Gregg* v. *Georgia*, 428 U.S. 153, 179 (1976). "Since *Furman*," this Court has

"insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988) (citing *Gregg* v. *Georgia*, 428 U.S. at 189 (plurality opinion of Stewart, Powell, and Stevens, JJ.)). To accomplish this task, states must utilize "clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Lewis* v. *Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (internal quotation marks omitted)).[1] Nine states, all of whom are amici, have elected to meet these requirements by assigning to the trial judge, at least in part, the responsibility of considering and applying sentencing factors. These states are Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska.[2] In *Walton* v. *Arizona*, this Court upheld

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[1] "Over the course of the past 15 years, this Court has assumed the role of rulemaking body for the States' administration of capital sentencing — effectively requiring capital sentencing proceedings separate from the adjudication of guilt, . . . dictating the type and extent of discretion the sentencer must and must not have . . . ." *Walton* v. *Arizona*, 497 U.S. 639, 657 (1990) (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

[2] See Ala. Code §§ 13A-5-43 – 13A-5-52 (LEXIS through 2001 Legis. Sess.); Ariz. Rev. Stat. Ann. § 13-703 (West & West Supp. 2001); Colo. Rev. Stat. § 16-11-103 (LEXIS through 2001 Legis. Sess.); Del. Code Ann. tit. 11, § 4209 (LEXIS through 2001 Legis. Sess. 141st Gen. Assemb.); Fla. Stat. § 921.141 (LEXIS through 2001 Legis. Sess.); Idaho Code § 19-2515 (LEXIS through 2nd Legis. Sess. 55th Legis.);

Arizona's scheme, thereby affirming the constitutional validity of judicial capital sentencing. 497 U.S. 639, 655 (1990).

"When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997). Stare decisis is "'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Hohn* v. *United States*, 524 U.S. 236, 251 (1998) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)). "'Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.'" *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 231 (1995) (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)).[3]

Ind. Code Ann. § 35-50-2-9 (LEXIS through 2001 Legis. Sess.); Neb. Rev. Stat. Ann. §§ 29-2520 – 29-2523 (LEXIS through 2001 Legis. Sess.); Mont. Code Ann. §§ 46-18-301 – 46-18-306 (LEXIS through 2001 legislation); but see Mont. Code Ann. § 46-1-401 (2001).

[3] See also *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) ("[E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification'") (quoting *United States* v. *International Business Machines Corp.*, 517 U.S. 843, 856 (1996);

In determining whether this "special justification" exists, this Court's "judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood*, 505 U.S. at 854 (plurality opinion of O'Connor, Kennedy, and Souter, JJ.). The considerations relevant to this analysis include the workability of the precedent in question, relevant reliance on the precedent, and the relation of the precedent to other changes in the law. See *South Central Bell Telephone* v. *Alabama*, 526 U.S. 160, 166 (1999) (citing *Planned Parenthood*, 505 U.S. at 854-55). Because judicial capital sentencing has proven workable, was created in reliance upon this Court's interpretation of the Eighth Amendment, and has not been undermined by recent precedent including *Apprendi*, this Court should reaffirm its constitutional viability. To do otherwise would be an exercise in "laying traps for unwary States, and generating a fundamental uncertainty in the law that shows no signs of ending or even diminishing." *Walton*, 497 U.S. at 673 (Scalia, J., concurring in part and concurring in the judgment); see also *Jones* v. *United States*, 526 U.S. 227, 271 (1999) (Kennedy, J., dissenting)

Hubbard v. *United States*, 514 U.S. 695, 712 n. 11 (1995) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation") (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

("[S]tates should not be confronted with an unexpected rule mandating that what were once factors bearing upon the sentence must now be treated as offense elements for determination by the jury").

I. This Court's Ruling in *Walton* v. *Arizona* — That Judges May Perform the Channeling Function Required By *Furman* v. *Georgia* Through the Application of Statutory Aggravators — Has Not Proven In Any Way Unworkable.

The first question posed by the doctrine of stare decisis is "whether the rule has proved to be intolerable simply in defying practical workability." *Planned Parenthood*, 505 U.S. at 854 (citing *Swift & Co.* v. *Wickham*, 382 U.S. 111, 116 (1965)).[4] The purpose of the channeling requirement in *Furman* and subsequent cases was to make capital sentencing more equitable and uniform.[5] The *Walton* rule permitting judges to perform this function by applying statutory aggravators is clear

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[4] See also *Witte* v. *United States*, 515 U.S. 389, 406 (1995) (Scalia, J., concurring) (finding no violation of the Double Jeopardy Clause based upon a refusal to give stare decisis effect to jurisprudence that "is not only wrong but unworkable as well") (citing *Planned Parenthood*, 505 U.S. at 982-84 (Scalia, J., concurring in judgment in part and dissenting in part)).

[5] See *Walton*, 497 U.S. at 664 (Scalia, J., concurring in part and concurring in the judgment) ("Pursuant to *Furman*, and in order to achieve a more rational and equitable administration of the death penalty, we require that States channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance") (citations and quotations omitted).

and practical. Ring offers neither argument nor evidence that judicial capital sentencing has in any way proven difficult or contrary to the purposes of *Furman*. While it may have engendered opposition, it has in no way proven unworkable. See *Planned Parenthood*, 505 U.S. at 855 (mere opposition is insufficient to establish that jurisprudence is, or has become, "unworkable").

II. The States Have Placed Considerable Reliance Upon the Validity of *Walton*.

The second question posed by stare decisis is "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Planned Parenthood*, 505 U.S. at 854. "*Stare decisis* has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard* v. *United States*, 514 U.S. 695, 714 (1995) (quoting *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991)). "The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of 'an arbitrary discretion in the courts' is restrained. Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)." *Hubbard* v. *United States*, 514 U.S. at 716 (Scalia, J., concurring in part and concurring in the judgment) (quoting The Federalist No. 78, p. 471 (C. Rossiter ed. 1961)).

While *Apprendi* involved a question not previously resolved, this case raises a claim confronted and rejected by the Court directly in *Walton* and indirectly on-

numerous other occasions under both the Sixth and Eighth Amendments.[6] This precedent is "integrated into

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[6] See, e.g. *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) ("This Court . . . has never suggested that jury sentencing in a capital case is constitutionally required[,] [a]nd it would appear that judicial sentencing should lead, if anywhere, to greater consistency in the imposition at the trial court level of capital punishment because a trial judge is more experienced in sentencing than a jury and therefore is better able to impose sentences similar to those imposed in analogous cases"); *Spaziano* v. *Florida*, 468 U.S. 447 (1984) (Sixth Amendment not offended by judge imposing sentence of death where jury has recommended sentence of life imprisonment); *Cabana* v. *Bullock*, 474 U.S. 376 (1985) (Constitution permits appellate court — rather than requires jury or trial court — to determine if the intent element required by *Enmund* v. *Florida*, 458 U.S. 782 (1982), has been satisfied); *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986) (sentencing factors are "not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment") (quoting *Bullington* v. *Missouri*, 451 U.S. 430, 438 (1981)); *Hildwin* v. *Florida*, 490 U.S. 638 (1989) (reaffirming rejection of claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death); *Clemons* v. *Mississippi*, 494 U.S. 738 (1990) (Neither Sixth nor Eighth Amendments preclude appellate court from upholding a death sentence based in part on an invalid or improperly defined aggravating circumstance either by re-weighing of aggravating and mitigating evidence or by harmless error review); *Walton* v. *Arizona*, 497 U.S. 639 (1990) (States are not required to denominate capital "aggravating circumstances" as "elements" of the offense or permit only a jury to determine existence of such circumstances); *Blystone* v. *Pennsylvania*, 494 U.S. 299, 306-307 (1990) (Constitution does not require a State to ascribe any specific weight to particular factors either in aggravation or mitigation to be considered by the sentencer); *Harris* v. *Alabama*,

the fabric of the law" and has "engendered substantial reliance." *Adarand*, 515 U.S. at 233; see also *Planned Parenthood*, 505 U.S. at 856. In reliance upon this precedent, many states have enacted or continued to employ legislation providing for judicial capital sentencing. Pursuant to these statutes, approximately 800 inmates are currently under a sentence of death.[7] Overruling *Walton* would cast doubt on the validity of a great number of these sentences, obtained and defended at considerable effort and expense. The reliance that the states have placed upon *Walton* is thus immense.

III. This Court's Ruling in *Apprendi* v. *New Jersey* Did Not Undermine the Validity of *Walton*.

The third question posed by stare decisis is "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood*, 505 U.S. at 855; cf. *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (this Court has overruled precedents "when subsequent cases have undermined their doctrinal underpinnings"); *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995) (this Court has

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513 U.S. 504 (1995) (Eighth Amendment not violated by trial judge overriding jury life recommendation without according "great weight" to that jury recommendation as required by the state law of Alabama's sister state, Florida).

[7] This total broken down by State is as follows: Alabama 188; Arizona 128; Colorado 6; Delaware 17; Florida 385; Idaho 20; Indiana 39; Montana 6; and, Nebraska 6. See NAACP Legal Defense and Educational Fund, Inc., Quarterly Report by the Criminal Defense Project, Death Row U.S.A. at 21-22 (Fall 2001). These numbers have fluctuated slightly (e.g., Colorado presently has five death row inmates — two sentenced by a trial judge), but remain essentially correct.

overruled a precedent if it "has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court"). *Walton* is hardly a "remnant of abandoned doctrine." To the contrary, the capital sentencing scheme upheld in *Walton* comports fully with the holding and reasoning of *Apprendi*. *Apprendi* did not modify the longstanding rule that judges can find facts, including facts not considered or found by the jury, for purposes of imposing a sentence within a prescribed sentencing range. This is all that happens when a judge is assigned the responsibility of performing the channeling function required by the Eighth Amendment.

A. The common law history to which this Court referred in *Apprendi* confirms that judges may take into account facts not found by the jury so long as they do not impose a sentence beyond the maximum prescribed for the crime.

Two Terms ago in *Apprendi*, this Court reviewed the common law history that underlies the Sixth Amendment and concluded that a judge could not sentence a defendant beyond the range prescribed by the criminal statute under which the defendant was tried and convicted. 530 U.S. 466 (2000). This Court cautioned, however, that "nothing in this history suggests that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute." *Id.* at 481. Amici believe that this statement is historically accurate, constitutionally correct, and sufficient to dispose of this case. See generally Brief of the United States in *Harris* v. *United States*, No. 00-10666, at 31-36 (discussing how history supports this

Court's decision in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986)).

In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court made clear that the Sixth Amendment right to trial by jury is the right to have a jury pass on the ultimate question of guilt or innocence, not punishment. "The Sixth Amendment never has been thought to guarantee a right to a jury determination of" the criminal sentence. *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984); see also *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976) (This Court "has never suggested that jury sentencing is constitutionally required. [Rather] it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases").

Nor does state constitutional law provide such a right. In Alabama, juries have had no state constitutional duty or right to participate in criminal sentencing.[8] Likewise, amici are unaware of any court of last resort in any jurisdiction that has extended a constitutional right to

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[8] See *Ex parte Giles*, 632 So. 2d 577, 580 (Ala. 1993) ("'By the common law, the jury determined merely the guilt or innocence of the prisoner; and, if their verdict was guilty, their duties were at an end. They had nothing whatever to say as to the punishment to be inflicted. The court alone determined what the punishment should be, its extent and its severity; with that the jury had nothing to do. Their whole duty was discharged when the verdict of guilty was pronounced'") (quoting *Fields* v. *State*, 47 Ala. 603, 606 (1872)).

trial by jury to sentencing proceedings in a criminal matter.[9]

Rather than vesting a jury with the authority to impose punishment upon those it found guilty of criminal activity, Anglo-American jurisdictions have traditionally

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[9] See *Paterson* v. *State*, 674 N.E.2d 528, 541 (Ind. 1996) (stating that "the right to trial by jury under the Indiana Constitution is limited to the question of guilt or innocence"); *State* v. *Hoffman*, 851 P.2d 934, 939 (Idaho 1993) (interpreting state constitutional provision providing that "the right of trial by jury shall remain inviolate" and stating "it is well settled that punishment in a capital case is to be determined by a judge rather than a jury"); *State* v. *Cohen*, 604 A.2d 846, 852 (Del. 1992) (holding that "defendants are not guaranteed the right under the Delaware Constitution to have a jury determine punishment in a capital case"); *State* v. *Wedge*, 652 P.2d 773, 776 (Or. 1982) (stating that the Oregon constitutional right to jury trial does not "mandate jury participation in sentencing"); *Jones* v. *State*, 416 S.W.2d 412, 414 (Tex. Crim. App. 1967) (stating that "the constitutional right of trial by jury does not encompass the right to have the jury assess the punishment"); *Woods* v. *State*, 169 S.W. 558, 559 (Tenn. 1914) (interpreting the state constitutional right to trial by jury and stating that "it is not essential that the jury assess the punishment, unless the statutes of the state so direct"); *State* v. *Hamey*, 67 S.W. 620, 621-625 (Mo. 1902) (interpreting the constitutional provision providing that "the right of trial by jury as heretofore enjoyed shall remain inviolate" and stating that it "is limited to the trial of the question of guilt or innocence"); *George* v. *People*, 47 N.E. 741, 744 (Ill. 1897) (interpreting the constitutional provision providing "the right of trial by jury as heretofore enjoyed shall remain inviolate" and holding that "the language of the constitution was never intended to confer upon the jury a constitutional right to fix the term of imprisonment on the trial of a person indicted for a felony").

relied upon the trial court to make such sentencing determinations independent of the jury. As early as the first two decades of the Massachusetts Bay Colony, sentencing authority rested in the sound discretion of the trial court. Joel Samaha, *Fixed Sentences and Judicial Discretion in Historical Perspective*, 15 William Mitchell L. Rev. 217, 220-22 (1989).[10] As this Court recognized in *Apprendi*, "judges in this country have long exercised discretion [taking into consideration various factors relating both to offense and offender] in imposing sentence *within statutory limits* in the individual case." 530 U.S. at 481. In fact, "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind [and] the extent of punishment to be

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[10] See also *Apprendi*, 530 U.S. at 519 (Thomas, J., concurring) ("noting judges' broad discretion in setting amount of fine and length of imprisonment for misdemeanors, but praising determinant punishment and 'discretion . . . regulated by law'") (quoting 4 W. Blackstone, Commentaries on the Law of England 371-72 (1769)); see also *In re Shannon B.*, 22 Cal. App. 4th 1235, 1240, 27 Cal. Rptr. 2d 800, 803 (1994) (citing 1 Joseph Chitty, The Criminal Law 711 (2d ed. 1826); 1 J. Stephen, A History of the Criminal Law of England, ch. 13 (1883)) (punishment for many English capital felonies was discretionary, with a wide variety of sanctions available other than death, which was "left to the wisdom of the court").

imposed within limits fixed by law." *Williams* v. *New York*, 337 U.S. 241, 246 (1949).[11]

The common law cases and nineteenth century criminal procedure treatise cited in Justice Thomas's concurring opinion in *Apprendi*, 530 U.S. at 502, are entirely consistent with this principle. The Massachusetts larceny statute applied in *Commonwealth* v. *Smith* (cited by Justice Thomas, *id.*) imposed a sentence of treble damages — three times the amount stolen. 1 Mass. *245, 1804 WL 709. The court in *Smith* held that it could not sentence the defendant for stealing goods whose value was not alleged in the indictment. The court thus eliminated all sentencing discretion on its part and put the questions of guilt *and* sentence entirely in the hands of the jury. But this holding should not be seen as questioning the common law legitimacy of judicial sentencing discretion. Had the judge in *Smith* not insisted that the amount stolen be alleged in the

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[11] This Court's "periodic recognition of judges' broad discretion in sentencing — since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range . . . has [however] been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature." *Apprendi*, 530 U.S. at 481-82 (citations omitted); see also *United States* v. *Tucker*, 404 U.S. 443, 447 (1972) ("The Government is also on solid ground in asserting that a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review"); *Williams*, 337 U.S. at 247 (the judge's task in sentencing is to impose, "within fixed statutory or constitutional limits[,] the type and extent of punishment after the issue of guilt" has been resolved).

indictment, he would have arrogated to himself the power to impose a literally infinite range of punishment, based on a finding of fact neither considered by the jury nor necessarily proven beyond a reasonable doubt.

This is a far different case from one in which the statute assigns a fixed range of punishment — even one with a very high maximum — but leaves to the trial judge the discretion to sentence the convicted defendant, on the basis of a variety of factors not necessarily considered by the jury, within that fixed range. The treatise cited by Justice Thomas makes this point clear:

> The reader should distinguish between the foregoing doctrine, and the doctrine stated elsewhere that, within the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. *Where the law permits the heaviest punishment, on a scale laid down, to be inflicted, and has merely committed to the judge the authority to interpose its mercy and inflict a punishment of a lighter grade, no rights of the accused are violated though in the indictment there is no mention of mitigating circumstances.* The aggravating circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy. This is an entirely different thing from punishing one for what is not alleged against him.

1 Bishop, Criminal Procedure § 85, at 54 (2nd ed. 1872) (emphasis added) (internal citation omitted); see also 1 Bishop, Criminal Procedure § 85, at 50 (3rd ed. 1880); 1 Bishop, Criminal Procedure § 85, at 50 (4th ed. 1895).

As Justice Thomas recounted in *Apprendi*, 530 U.S. at 503 & n. 3, Massachusetts amended its larceny statute in 1836 to create two different ranges of punishment, depending on whether the amount stolen exceeded $100.[12] While the amount stolen thus remained an element of the crime because it changed the applicable range of punishment, *Hope* v. *Commonwealth*, 50 Mass. 134 (1845), the fact that the judge now had discretion to sentence within the applicable range was not problematic. Other states likewise had property crime statutes in the nineteenth century that gave judges the discretion to sentence within statutorily prescribed ranges.[13] This

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[12] "Every person who shall commit the offence of larceny, by stealing of the property of another any money, goods or chattels [or other sort of property], if the property stolen shall exceed the value of one hundred dollars, shall be punished by imprisonment in the state prison, *not more than* five years, or by fine *not exceeding* six hundred dollars, and imprisonment in the county jail, *not more than* two years; and if the property stolen shall not exceed the value of one hundred dollars, he shall be punished by imprisonment in the state prison or the county jail, *not more than* one year, or by fine *not exceeding* three hundred dollars." Mass.Rev.Stat., ch. 126, § 17 (1836) (emphasis added).

[13] See, e.g., *Brightwell* v. *State*, 41 Ga. 482, 483 (Ga. 1871) (Georgia arson statute provided for judicial sentencing discretion within a prescribed range); *Jones* v. *State*, 63 Ga. 141, 143 (Ga. 1879) (Georgia burglary statute provided for discretionary sentencing within prescribed ranges of punishment); *State* v. *Perley*, 30 A. 74 (Me. 1894)

same system of discretionary judicial sentencing within legislatively prescribed boundaries continues to be a dominant feature of the American criminal justice system. See *Apprendi*, 530 U.S. at 481-83, 497 (affirming the legal principle of discretionary judicial sentencing within a range prescribed by statute).

Within the American federal system, a judge could thus "appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972).[14] This

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(Maine robbery statute provided that "punishment for the crime may be as high as imprisonment for life, and it may be as low as any term of years, which might be two"); *Lacy* v. *State*, 1862 WL 951, at *2-3 (Wis. 1862) (Wisconsin arson statute allowing for discretionary judicial sentencing within statutorily prescribed ranges).

[14] *Tucker* cites the following federal cases: *United States* v. *Trigg*, 392 F.2d 860, 864 (7th Cir. 1968) ("That some of the considerations affecting the court's exercise of informed discretion in fixing the sentence did not stem from the presentence report or from what the court observed from trial demeanor or testimony does not, of itself, invalidate the sentence"); *Davis* v. *United States*, 376 F.2d 535, 538 (5th Cir. 1967) (recognizing that it is permissible for the judge to consider presentence data concerning prior convictions in determining sentence); *Cross* v. *United States*, 354 F.2d 512, 514-515 (D.C. Cir. 1965) (holding that sentence imposed by the trial judge was not improper even though it was based in part upon knowledge gleaned by the judge during the trial of a co-defendant); *United States* v. *Doyle*, 348 F.2d 715, 721 (2nd Cir. 1965) ("The narrowing of the indictment to a single count limits the maximum punishment the court can impose but not the scope of the court's consideration within the maximum"); *United States* v. *Magliano*, 336 F.2d 817, 822 (4th Cir. 1964) ("After conviction, everything of possible pertinency may be considered,

discretion was bounded only by the requirement that the sentence fall within the statutory limits. *Apprendi*, 530 U.S. at 467; see also *Tucker*, 404 U.S. at 447 (recognizing that the broad latitude afforded a federal judge in making a sentencing determination is clearly circumscribed by the absolute requirement that the sentence fall with the statutorily prescribed range).

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though it has no competency as proof of what it purports to indicate"); Fed. R. Crim. Pro. 32(a)(2) (providing for the consideration, by federal judges, of presentence investigation reports containing information about a convicted criminal as it proves helpful in sentencing); *Williams* v. *New York*, 337 U.S. at 247 (A judge's "task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined . . . [a]nd modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial"); *North Carolina* v. *Pearce*, 395 U.S. 711, 723 (1969) ("A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities'").

B. Because judicial capital sentencing does not increase the maximum punishment to which the defendant is exposed following the verdict of guilt, it is consistent with *Apprendi*.

It is thus well established that the Constitution is not offended by a state legislature attaching a range of punishment to a particular offense and giving the trial judge discretion to select a punishment within that range. *Apprendi* acknowledged and reaffirmed that principle. 530 U.S. at 481 ("[N]othing . . . suggests that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute"). Moreover, until this Court struck down the use of unguided discretionary capital sentencing schemes in *Furman*, no distinction was made between offenses punishable by death and those carrying lesser criminal sanctions.[15] See *Williams*, 337 U.S. at 251

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[15] It is true that throughout this Nation's history — including the present — many states have placed the authority to impose a death sentence in the jury. See *Spaziano* v. *Florida*, 468 U.S. at 472 (Stevens, J., concurring in part and dissenting in part) (noting that "of 42 jurisdictions that employed discretionary capital sentencing in 1948, only 3 did not require its imposition through jury determinations which the trial judge could not disregard" and "[a]t the time of *Furman*, only 2 . . . permitted a death sentence to be imposed without the consent of a jury"). Unlike that of the Eighth Amendment, however, this Court has never identified an "evolving" standard governing the meaning of the Sixth Amendment right to trial by jury. That a majority of state legislatures chose, at a particular time, to place capital sentencing authority in the jury did not, therefore, make sentencing in a capital case part of the Sixth Amendment right to trial

(upholding sentence of death imposed following jury's recommendation of life imprisonment; "[l]eaving a sentencing judge free to avail himself of out-of-court information . . . does secure to him a broad discretionary power"). *Furman*, however, "which has come to stand for the principle that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion," changed that rule in capital cases. *Walton*, 497 U.S. at 657 (Scalia, J., concurring in part and concurring in the judgment). Capital punishment is, in fact, the only punishment that constitutionally may not be imposed pursuant to an unguided discretionary sentencing scheme.[16]

Sentencing proceedings following a conviction for capital murder necessarily fall outside the holding of *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a

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by jury. *Spaziano*, 468 U.S. at 459 ("[T]he Sixth Amendment never has been thought to guarantee a right to a jury determination of [the appropriate punishment to be imposed on an individual]"); *id.* at 463, n. 8 (rejecting proposition that "because juries may sentence, they constitutionally must do so").

[16] For example, this Court has never read the Eighth Amendment to require that "after a person is convicted . . . , there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to" life in the penitentiary. *Proffitt*, 428 U.S. at 259. In a capital case, however, following a conviction, "[t]he sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant." *Spaziano*, 468 U.S. at 459.

jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. A capital offense is one that, by definition, carries a maximum sentence of death. *Black's Law Dictionary* 143 (6th ed. 1991) (defining capital case as "one for which death penalty may, but need not necessarily, be imposed"). When a judge makes factual findings to support the imposition of the death penalty, he is not enhancing the sentencing range for which a defendant would otherwise be ineligible. Rather, the judge is simply conducting a process designed to channel and rationalize the imposition of the death penalty.

"It was in *McMillan* v. *Pennsylvania* that this Court, for the first time, coined the term 'sentencing factor' to refer to a fact that was not found by a jury but could affect the sentence imposed by the judge." *Apprendi*, 530 U.S. at 485 (internal citation omitted). Although the term may have been "coined" in *McMillan*, "sentencing factors" are in the realm of capital punishment a product of this Court's Eighth Amendment jurisprudence.

More specifically, the birth of capital "sentencing factors" can be traced to this Court's decision in *Furman*. "In *Furman*, the Court held unconstitutional a Georgia statute that vested the jury with complete and unguided discretion to impose the death penalty or not as it saw fit, on the ground that such a procedure led to the 'wanton' and 'freakish' imposition of the penalty." *Beck* v. *Alabama*, 447 U.S. 625, 639 (1980) (Stewart, J., concurring) (quoting *Furman*, 408 U.S. at 310). "Since *Furman*, [this Court has] insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988) (citing *Gregg* v. *Georgia*, 428

U.S. 153, 189 (1976)) (plurality opinion of Stewart, Powell, and Stevens, JJ.). Compliance with the Court's decisions required the creation of sentencing factors. Indeed, without them, it would not be possible to "channel the sentencer's discretion by 'clear and objective standards that provide specific and detailed guidance.'" *Godfrey* v. *Georgia*, 446 U.S. at 428 (plurality opinion).

There is, therefore, plainly a distinction between capital aggravating circumstances and the type of "sentencing enhancement" at issue in *Apprendi*. Unlike a "sentencing enhancement," aggravating circumstances do not serve to increase the range of punishment to which one is exposed following a finding of guilt. An individual found guilty of a capital offense is eligible for and exposed to a death sentence upon conviction. Aggravating circumstances provide the channeling function required by the Eighth Amendment; they do not increase the sentencing range to include that for which a defendant would otherwise be ineligible. The unique purpose served by aggravating circumstances has been repeatedly upheld. They are "not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Poland*, 476 U.S. at 156 (quoting *Bullington* v. *Missouri*, 451 U.S. 430, 438 (1981)). An aggravating circumstance cannot, therefore, be "appropriately characterized as 'a tail which wags the dog of the substantive offense.'" *Apprendi*, 530 U.S. at 495 (quoting *McMillan*, 477 U.S. at 88).

In *Apprendi*, the Court noted: "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment of the court as it existed during the years surrounding our

Nation's founding." *Apprendi*, 530 U.S. at 478 (footnote omitted). What may have been unknown at the time of the founding has, however, become a constitutional necessity in cases where the offense is punishable with a sentence of death. A State may not impose the death penalty simply by increasing the number and specificity of the elements required to convict. In the capital context, therefore, the "distinction between 'elements' and 'sentencing factors'" is not "constitutionally novel" but constitutionally required. Compare *Apprendi*, 530 U.S. at 494 (referring to the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors'").

Apprendi did not render "the term 'sentencing factor' [ ] devoid of meaning." 530 U.S. at 494 n. 19. Rather, "[t]he term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Id.* This is precisely the manner in which "sentencing factors" are used in the context of Arizona's capital punishment statute.

Ring was charged with first-degree murder. There is no dispute that he was properly convicted of that offense pursuant to a jury trial wherein the jurors found the existence of each element of the offense beyond a reasonable doubt. There can also be no dispute that the offense carried with it the possible imposition of a death sentence. Unlike *Apprendi*, where the finding at issue "increased — indeed, it doubled — the maximum range within which the judge could exercise his discretion," *id.* at 474, the aggravating factors in Ring's case merely served to guide the judge's discretion within the established range. Accordingly, the Arizona sentencing process and this Court's decision in *Walton* are fully

consistent with *Apprendi*. It is this reading of *Apprendi*, and not that suggested by Ring, which reconciles the holding with the longstanding history of judicial discretion in sentencing proceedings, the understanding that "the Sixth Amendment never has been thought to guarantee a right to a jury determination" of the sentence, *Spaziano*, 468 U.S. at 459, and the Court's specific application of that understanding to the imposition of the death penalty. See, e.g., *Hildwin* v. *Florida*, 490 U.S. 638, 640 (1989) (acknowledging and affirming prior rejection of "claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death").

Nor is a different result compelled by the Arizona Supreme Court's statement: "In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings." *State* v. *Ring*, 25 P.3d 1139, 1151 (Ariz. 2001). This statement is true everywhere, not just in Arizona, because of the Eighth Amendment. A defendant can never be sentenced to death based on the "jury's verdict alone." Sentencing factors in a capital case are required because, no matter how a State defines the elements of a capital offense, the Eighth Amendment requires additional proceedings before a sentence of death may be imposed.

Indeed, "[s]ome States responded to *Furman* by making death the mandatory punishment for certain categories of murder." *Walton*, 497 U.S. at 661 (Scalia, J., concurring). The Court, however, rebuffed those efforts, invalidating the statutes on the basis that they "raised the same possibility that the death penalty would be imposed in an arbitrary and capricious manner as the statute held invalid in *Furman*." *Beck*, 447 U.S. at 640; see also *Woodson* v. *North Carolina*, 428 U.S. 280 (1976);

Roberts v. *Louisiana*, 428 U.S. 325 (1976). While the class of individuals who are subject to the death penalty may be narrowed through the classification of elements defining a capital offense, the Eighth Amendment requires more. "*[A]fter a person is convicted* of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death." *Proffitt*, 428 U.S. at 259 (emphasis added). Capital punishment is, therefore, unique in that it is the only punishment requiring — not pursuant to a statute passed by a state legislature, but by mandate of this Court — that further factual findings be made after a jury has found the existence of every element necessary to convict. The sentencing considerations required by the Eighth Amendment should not and cannot be classified as elements of the offense. It is impossible to incorporate "the unique circumstances of the individual defendant" as an element of the offense. *Spaziano*, 468 U.S. at 459.

Accordingly, even in states that use judicial sentencing in capital cases but require the jury first to find aggravating circumstances, the judge must still make a determination that those aggravating circumstances outweigh any mitigating circumstances. This determination is constitutionally necessary to the imposition of the death penalty. Reading *Apprendi* to require that any finding necessary to impose a death sentence be found by a jury would therefore invalidate any sort of meaningful judicial sentencing in capital cases. It would require not only the overruling of *Walton* but the repudiation of the reasoning in numerous other decisions of this Court (see n. 6).

Ring's contention, that his death sentence violates *Apprendi* because the "jury verdict alone" is insufficient to

support a death sentence under Arizona law, is also premised on a misunderstanding of the meaning of "statutory maximum" in *Apprendi*. The statutory maximum is determined by assessing the permissible range of punishment for a particular offense. Under Arizona law, first degree murder is classified as a class 1 felony and, as such, may be punished by death or life in prison. A.R.S. § 13-1105(c) (2001). Thus, a defendant is "exposed" to a sentence of death upon the jury's guilty verdict. Here, the jury's verdict exposed Ring to a sentencing range with a maximum of death.

Finally, contrary to Ring's assertion, this Court is not bound by the Arizona Supreme Court's statement that the range of punishment for a conviction of first degree murder is "on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of parole." *Ring*, 25 P.3d at 1151. In *Wisconsin* v. *Mitchell*, this Court considered a claim that Wisconsin's sentencing enhancement for discriminatory intent violated the First Amendment. 508 U.S. 476 (1993). Although the Wisconsin Supreme Court had determined that the enhancement statute violated the First Amendment "by punishing what the legislature has deemed to be offensive thought," rather than conduct, this Court rejected that analysis. More specifically, this Court stated:

> There is no doubt that we are bound by a state court's construction of a state statute. . . . But here the Wisconsin Supreme Court did not, strictly speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular word or phrase. Rather, it merely characterized the "practical effect" of the statute for First Amendment purposes. . . . This

> assessment does not bind us. Once any ambiguities as to the meaning of the statute are resolved, we may form our own judgment as to its operative effect.

Mitchell, 508 U.S. at 483-84 (internal citations omitted). Similarly, the Arizona Supreme Court's conclusion as to the maximum penalty permitted upon conviction for the first degree murder "merely characterizes the practical effect" of Arizona's death penalty statute. This Court may, therefore, form its own judgment as to its "operative effect."

Here, the operative effect of Arizona's statute is this: A verdict of guilt on a first degree murder charge exposes the defendant to the death penalty by authorizing additional procedures — procedures mandated by the Eighth Amendment for the purpose of distinguishing "between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano*, 468 U.S. at 460 (citing *Zant* v. *Stephens*, 462 U.S. 862, 873-880 (1983); *Furman*, 408 U.S. at 294 (Brennan, J., concurring)). That the trial judge made this determination based upon "'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment" does not render Ring's death sentence unconstitutional. *Poland*, 476 U.S. at 156 (quoting *Bullington*, 451 U.S. at 438).

CONCLUSION

For the foregoing reasons, *Walton* should not be overruled and the judgment of the Arizona Supreme Court should be affirmed.

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